courtly charm of pliancy, but it possessed, what is better, the roughness of inflexible integrity, and a candor that defied concealment." Pickering himself, in a letter to his nephew, Dr. Clarke of Boston, in 1797, writes: "As applying to myself, the words of Pope (I believe it is) sometimes occur to me, in which he describes an 'old prig who never changed his principles or wig.' While all sorts of people are greased with pomatum and whitened with powder, my bald head and lank locks remain *in statu quo*." He came to be known as the old Roman, with a streak in him of the Greek, Cato, Cincinnatus, and Aristides. But there was something more in him than in either or all these.

GEORGE E. ELLIS.

ART. VI. — CRITICAL NOTICES.

1. — *Commentaries on American Law.* By JAMES KENT. Twelfth Edition. Edited by O. W. HOLMES, JR. Boston: Little, Brown, & Co. 1873.

THE publication of a new edition of a law book is not usually a matter of general interest; but an exception may well be made in favor of this. There is probably no lawyer, not otherwise conspicuous, whose name is more widely known and respected among the public at large in this country than that of Chancellor Kent. Professional merit must in general find its only lasting reward in the applause of the profession. The reputation of judicial learning and forensic eloquence extends but little beyond contemporaries, often hardly beyond personal acquaintance; while more permanent work, embodied in written judgments and treatises, however great and enduring its effect may be, gains no credit for its authors, except among those whose business obliges them to study it. Happy, indeed, is the judge or the commentator who is known and appreciated even by more than a small section of what is called by courtesy a learned profession. The fate of Kent in this respect has, however, been exceptional; his book has made him a reputation which flourishes, vaguely enough to be sure, among thousands who never heard of Lord Hardwicke or Chief Justice Marshall, and it is cited and reverenced as an oracle by hundreds of lawyers throughout the United States who would doubtless agree with King James's profane comparison of

Coke's writings to the peace of God, which passeth all understanding. What is the reason of this popularity? It is to be found, not so much in the ability of the writer, though that was great; nor in his style, for that is dry to the last degree; but in his good fortune in the choice of a subject.

The American law is based, as every one knows, upon the English; and until the Revolution it was, so far as it went, nearly the same; nor, after that time, was the departure very rapid at first. Justice continued to be administered under the same forms and by the same rules as before; and in the absence of precedents of their own to govern them, the courts continued to rely on the opinions of English judges to guide them in the exposition of our common system; and these opinions, though not technically of the same authority as during the colonial period, had practically, and indeed still have in a great measure, almost as much weight. The State of Kentucky did its best to set up a common law of its own by the enactment that no decision of any English tribunal since July 4, 1776, should be cited in the courts of the State; but this was a singular instance. The first peculiarity which appeared in our laws, and which is to this day its most remarkable feature, was the course of decision caused by our system of written constitutions. This system gave to the courts a power unknown to the common law, — that of annulling the acts of other branches of the government, as contrary to the supreme law of the land; and under it continually arose important questions as to the lawful powers of the government, and especially of the Legislature. This class of questions found no precedent, and, till lately, no parallel; though difficulties of the same kind are now, it is said, beginning to puzzle the courts of the Dominion of Canada, where the powers of the provincial parliaments were limited by the fundamental Act of Confederation of 1867, much as those of our Legislatures are restrained by the Constitutions of the States and of the United States. The political effects of these instruments are those to which public attention has been mainly directed; but their effects on private rights have also been remarkable. One provision, for instance, is common to them all, — the preservation of the right of trial by jury both in civil and criminal causes; the result of this, in the former class of cases, is, that trifling disputes of all sorts, which ought to be settled in a summary way by the decision of a single magistrate, are carried by appeal before a jury and litigated at infinite cost of time, trouble, and money; and the legislature is powerless to provide a remedy, as has been done in England, by making the summary jurisdiction of the inferior

magistrates final in small cases. In criminal causes, again, the constitutional provisions as to the forms of trial, substantially the same in all the States, have been construed so as to secure to the prisoner the chance of escape by any of the minute technicalities known to the ancient common law; and objections which might formerly be looked upon with favor, as affording to a mercifully disposed tribunal the chance of relieving a man from a penalty out of all proportion to his offence, are suffered still to prevail to protect petty rascals from well-deserved sentences. It would be an interesting task, did space permit, to follow out the workings of our constitutional restrictions in the administration of every-day justice in civil and criminal cases; but this would require a whole book to itself.

The earliest and most remarkable departures of the American law from the English, on which it was founded, are thus readily traceable to our peculiar form of government. But there are also many subjects, in no way connected with this, where the course of legislation and of judicial decision throughout the United States, though generally consistent with itself, has varied from the current of the authorities in England; often merely anticipating changes which have come later on the other side of the Atlantic, as in the familiar instances of the laws restricting imprisonment for debt and those extending the rights of married women; and often, again, introducing strange novelties, the results of which are yet very doubtful.

It is easy enough now for a lawyer, or for any person whose attention is called to it, to notice some of the peculiar features which make of the American law, as a whole, a distinct system, notwithstanding the many minor differences between different sections of the country; but of late years, and especially since the death of Chancellor Kent, the progress has been very rapid. The equitable jurisdiction of the courts, formerly restrained and regarded with much jealousy, has increased, is increasing, and, at least as exercised by some tribunals, ought to be diminished. The system of special pleading, "curious, orderly, and beautiful as it is," in the language of the Chancellor, who pathetically deplored the earliest innovations on it, has been swept away like a cobweb; *etiam periere ruinæ*. The intricacies of the ancient and complex real-property law, derived from our ancestors, have in great part disappeared, only to be replaced by the newer and not less complex learning of tax-titles and pre-emption rights. In one part of the country the railroads are alternately declared to be and not to be public property, according as the railroads themselves or the public creditors are the parties to be plundered; while in another the unreasonable and oppressive legislation directed against the

traffic in liquors has accustomed the people to the edifying spectacle of laws which are openly, notoriously, and incessantly violated, as a matter of course, by all classes of the community.

All this is since Chancellor Kent died, twenty-six years ago; and when he began to write, twenty years before that, the growth of the American law had been far less rapid, less eccentric, and less noticeable. But even then many peculiar features of our jurisprudence were beginning to appear, which required an elementary book to explain them. Kent was, if not the first to perceive the existence of a subject so large and important, at least the first to attempt a systematic treatment of it. His book had but to appear to make its importance generally acknowledged. It became at once, and has ever since continued to be, not only the standard, but the only authority; it kept possession of the field which it was first to occupy, and is not likely soon to be superseded; and many generations of lawyers will doubtless continue to study it as the foundation of their professional knowledge, not, indeed, without some weariness of spirit, and sympathy with the students who, as related by one of them, were attracted by the Chancellor's reputation to attend in crowds the first delivery of the lectures which form the substance of the book, but whose patience was soon wearied out by the dreariness of the lecturer's style, and who mostly vanished after the first term.

Since the death of the author, in 1847, five editions of his Commentaries have been published before the present one; and each has been annotated copiously and learnedly. But the successive editions are made on no uniform plan, and tend rather to confuse than to help the student, consisting as they do of irregular sprinklings of new citations, often misleading, often superfluous, often conflicting with the text and with each other, and little or no attempt made to reconcile or explain them. In the present edition they are all (with a very few trifling exceptions) expunged. This seems a bold stroke; but no one who examines what has been substituted will regret the change. Each of Mr. Holmes's more important notes is a complete little essay in itself, a short treatise on the law of each subject in its order, as developed since Kent's time. The immense size of the field which has been searched for authorities, the discretion with which they have been selected, and the extreme conciseness with which their result is stated, are apparent on a very little use of the book, and calculated to inspire confidence in the soundness of the original views which are sometimes taken, and which it must have required some self-denial not to expand into a larger proportion of the whole space. And this confidence is sure to be increased on a

further study, which brings to light the thoroughness and accuracy with which the work has been done, more and more striking on a closer examination. The diligence which has been used to consider and compare everything that bears on the points discussed, to exclude everything which does not bear upon them, and the completeness of the discussion in so small a space, can be fully appreciated only by those who have occasion to examine with care the same subjects for themselves, or by those who have had the good fortune to see the work as it went on. No such eyewitness can have failed to remark, in the unceasing industry, in the abundant learning, in the patient statement and restatement of propositions till they reached a correct and satisfactory form, in the eagerness to obtain and readiness to consider fairly the views of others on doubtful points, so as to take in every possible view of them, which have marked the progress of the work, an example of how a lawyer and a scholar ought to write, even when he occupies no more pretentious position than that of annotator to another's book.

It follows, of course, from the nature of the work, that attention is necessary on the part of the student, not only to appreciate its value, but to make it useful at all. To get so much matter into the compass of a note requires extreme condensation; and to get it out again, into a shape for practical use, requires some expansion. This is unavoidable, from the nature of things. If Mr. Holmes had been a little less concise, his essays would have been easier, no doubt, to write, to read, and to apply in daily practice, — easier, perhaps, to remember; but no one but himself is competent to judge whether any amplification was possible in the space allowed, and it is fair to suppose that it was not.

Considerable use has been made in the notes of a class of books which has come into fashion since the days of Chancellor Kent. A new school of writers and thinkers on legal subjects has appeared of late; men who put their trust in Bentham and Austin, who have revived the study of the civil law, who have attempted to collect and compare the legal ideas of many nations, ancient and modern, and who aspire to create or contribute to a consistent, rational, and uniform system of jurisprudence, which shall be of general, or even universal, application. These writers are beginning to make their influence much felt, whether for good or evil is yet to be seen; but their existence, their ability, and their importance cannot be ignored even by those sceptics who are not fully convinced that this abstruse learning and brilliant theorizing can have any other practical result than the displacement of a technical jargon, which has at least the

advantage of some hundreds of years' interpretation, in favor of another dialect, understood only by its inventors. There can at least be no doubt that the aim of the modern school is excellent, its promises attractive, and many of its investigations valuable and interesting to other than professional readers. Mr. Holmes is, we understand, a disciple of this new school (if, indeed, he be not, as some of his other writings tend to show, the prophet of one yet newer), but he has introduced into his present work no undue proportion of strange doctrine, nothing that is not properly connected with, and explanatory of, his text; and what he has inserted makes us regret that there was not room for more.

One of the most elaborate and interesting of these essays is that on page 441 of the fourth volume, on Village Communities and the Origin of Property in Land, a subject which has lately been made comparatively popular by Sir Henry Maine's book. The note in question is an excellent example of the important results of the historical method of studying law, and of the light which has been thrown on obscure questions of English and American laws and customs by the comparison of them with those of other countries; a comparison which has, unfortunately, been in great part reserved for foreign scholars to make. To the general reader, this is probably the most attractive subject of which the editor has treated; but the other notes are of no less merit, though for the most part of a more purely professional interest. The "learned reader," to whom Judge Story so often appeals in his books, will find much profit, for instance, in the perusal of the comment on the doctrines of covenants running with the land, at page 480 of the same volume; and of master and servant, at page 260 of the second.

There are a few matters of mere mechanical detail in this edition which call for notice. A table of cases cited is indispensable in any law-book, and it is not wanting in this; but all the cases cited in the four volumes are indexed together at the beginning of the first, instead of each volume having its own table. This practice is somewhat in use at the present day; but it seems to us to be inconvenient. Any one who looks for a case by its name must know what it is about, and ought to know, if he is properly familiar with his Kent, in which volume the subject is to be found, with other cases which concern it; and if each volume had its own table, the trouble of consulting two would often be saved. This seems a small matter, but to one who uses the book much it is important. It is fair to say, however, that this arrangement has enabled the editor to restore the author's original division of the work into volumes. In the late

editions, the first volume was so small that it was made up with a piece of what was originally the second; but in this, the number of pages needful for the fair appearance of the volume is supplied by the index of cases, which is certainly a gain. No good reason, however, is perceived for omitting the separate index to the first volume, which stood in former editions. That volume is, in some respects, a work by itself (it has, indeed, been published as such, apart from the rest); and though, perhaps, a separate index was not worth the trouble of making in the first place, why drop it when it is already made? We will close our enumeration of the faults which a pretty careful study has discovered with the observation that the paper is thin and poor.

The aid given by the gentlemen named in the editor's Preface seems to have been efficient; and we observe in particular the mention of the assistance derived from the supervision of Mr. J. B. Thayer, a gentleman well known at the Boston bar, the value of whose co-operation may be best explained by the statement that he has lately been appointed to what is perhaps the most important professorship in the Harvard Law School, an institution whose care in the selection of men of learning and ability as instructors enjoys a well-deserved reputation through the country.

There are many law books in which the commentator has quite swamped his text, and has, in fact, made a new book. Mr. Holmes has not attempted to do this. He has confined himself strictly to the subordinate position; but in that position he has fairly earned the praise of being no unworthy continuer of the labors of the greatest of American legal authors, and might well appropriate to himself the modest and dignified language of the most famous of the English commentators: "I thought it safe for me not to take upon me, or presume that the reader should think all that I have said herein to be law; yet this I may safely affirm, that there is nothing herein but may either open some windows of the law, to let in more light to the student by diligent search to see the secrets of the law; or to move him to doubt, and withal to enable him to inquire, and learn of the sages what the law, together with the true reason thereof, in these cases is; or, lastly, to find out, where any alteration hath been, upon what ground the law hath been since changed; knowing for certain that the law is unknown to him that knoweth not the reason thereof, and that the known certainty of the law is the safety of all."